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IN THE
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October Term, A. D. 1904

No. 320

**THE EASTERN RAILWAY COMPANY, OF NEW
MEXICO, PECOS AND NORTHERN TEXAS RAIL
WAY COMPANY, ET AL.**

Plaintiffs in Error.

vs.

**GEORGE W. LITTLEFIELD, J. P. WHITE AND
THOMAS H. WHITE, COMPOSING THE FIRM OF L. P.
LITTLEFIELD CATTLE COMPANY.**

**BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR IN
OPPOSITION TO MOTION TO DISMISS.**

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GEORGE W. LITTLEFIELD, J. P. WHITE AND
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BRIEF AND ARGUMENT FOR PLAINTIFFS IN
ERROR IN OPPOSITION TO MOTION TO DIS-
MISS.

The defendants in error have presented a motion to dismiss the writ of error granted herein, assigning five reasons therefor, and have submitted brief in support of said motion. The grounds of the motion briefly expressed are: (a) That the record fails to show that some right, privilege or immunity under some statute of the United States was seasonably set up and claimed by plaintiffs in error in the State Court and that such right, privilege or immunity was denied by said court;

(b) That the record shows affirmatively that exclusive jurisdiction to try and determine this cause was not vested in the United States courts to the exclusion of the state courts; (c) That our assignments of error were based upon questions of fact which had been tried and decided against us; (d) That the errors complained of were not presented to and reviewed by the State courts in such way as to confer jurisdiction on this court to review the same; and (e) That the judgment rendered in the State courts is not void for want of jurisdiction.

The record shows that four railway companies were sued as defendants. It was charged in said petitions that The Eastern Railway Company of New Mexico, defendant, was duly incorporated under and by virtue of the laws of New Mexico with its principal office at Amarillo, Texas, The Pecos and Northern Texas Railway Company, incorporated under the laws of the State of Texas having its principal office at Amarillo, Texas, The Southern Kansas Railway Company of Texas, incorporated under the laws of the State of Texas with its principal office at Amarillo, Texas, and The Atchison, Topeka and Santa Fe Railway Company, incorporated under the laws of the State of Missouri and Kansas, with its principal offices located at Topeka, Kansas. (Pr. Rec., 2.)

It is further shown in the petition that the four lines of railway above described constitute a through route from Kenna, New Mexico and Bovina, Texas, to Kansas City, Missouri, and to St. Joe, Missouri; that the line of The Eastern Railway Company of New Mexico extends through the territory of New Mexico from Roswell to Texico on the line of said territory; that the Pecos and Northern Texas Railway extends from Texico through Hereford to Amarillo; that The Southern Kansas Railway Company of Texas extends from Amarillo, Texas,

to Higgins, Oklahoma, and that the line of The Atchison, Topeka and Santa Fe Railway extends from Higgins to Kansas City and St. Joe. (Pr. Rec., 2.)

It is then charged in the petition that The Atchison, Topeka and Santa Fe Railway Company is the parent and dominant corporation controlling its co-defendants, which are mere auxiliary and subordinate corporations under the supervision and control of the parent company and that they all form parts of what is known as the Santa Fe System of railways and were partners. (Pr. Rec., 3.)

As cause of action, it was alleged that in May, 1907, plaintiffs desired to ship a large number of cattle from Bovina and Kenna to St. Joe and Kansas City and made demand on the defendant companies for 200 cars to be furnished in September and October following at the above named stations for the transportation of these cattle from Bovina and Kenna to Kansas City and St. Joe and that relying upon the promise of the defendants to so furnish cars, the cattle were driven to the above named stations, but that the cars were never furnished; that defendants failed to so furnish same and refused to accept the cattle for shipment; that the cattle were held under herd until the 18th day of October, 1907, when plaintiff was forced to abandon the purpose of shipping said cattle during that season and same were returned to the ranch in Texas. (Pr. Rec., 5-6.) Damage was asked because of the failure of the defendants to furnish the cars for the transportation of the cattle and the failure of the defendants to receive and ship the same as demanded by the plaintiffs. (Pr. Rec., 6-7.) The defendant, The Pecos and Northern Texas Railway Company, by original answer filed May 25th, 1909, plead among other things as follows:

“This defendant demurs to the jurisdiction of this

court and says this court is without jurisdiction to hear and determine the matters in controversy herein for this: plaintiffs sue and seek to recover damages for a failure of The Eastern Railway Company of Texas to furnish cars by them demanded of it for the transportation of cattle over and beyond its line and over the lines of the other defendants interstate from Kenna, New Mexico, a station on the line of The Eastern Railway Company of New Mexico, to Kansas City or St. Joseph, in the state of Missouri, and plaintiffs have no legal right, either at common law or by state statute, to demand and have furnished to it by either of defendants cars to be used in transporting cattle beyond its respective line; but such right of action, if any, plaintiff has for a failure to furnish cars to go interstate and beyond the initial carriers' line, or on the line of any carrier in order, is given and created by the Interstate Commerce law, which vest in the United States courts exclusive jurisdiction to hear and determine such causes." (Pr. Rec., 8.)

The other three defendant railway companies adopted as their own the above demurrer as presented in behalf of The Pecos and Northern Texas Railway Company. (Pr. Rec., 11-12.) This demurrer was presented to the court and overruled (Pr. Rec., 14), and a bill of exceptions was taken to the action of the court in overruling the same and in holding that the state court did have jurisdiction to hear and determine the cause. (Pr. Rec., 15.)

In the same pleading containing said demurrer, defendants answered, as might be done under the Texas practice, that the request and demands for cars alleged by plaintiff to have been made "were unreasonable" and defendants and each of them were unable to comply therewith owing to an unusual and unprecedented demand for cars at such places at and before the time the cattle were tendered at said stations, and that there was an unusual and unprecedented increase in freight busi-

ness at said places and stations at said time, etc. (Pr. Rec., 9 and 10.)

There was a trial by jury on the merits of the case, which resulted in a verdict and judgment in favor of the plaintiffs. (Pr. Rec., 24-25.) The defendant railway companies duly filed their amended motion for a new trial setting up therein the error of the court in refusing to sustain their exception, because of the want of jurisdiction of the court over the subject matter in controversy. (Pr. Rec., 26.) The amended motion for a new trial was overruled and appeal was duly prosecuted to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, and in that court the appellant railway companies again assigned as error the action of the trial court in overruling the demurrer to the jurisdiction of the court over the subject matter in controversy. (Pr. Rec., 29.) The Court of Civil Appeals affirmed the judgment of the District Court and by motion for rehearing in that court, the appellant railway companies again assigned as error the action of the court in failing to sustain this demurrer. The motion for rehearing was overruled. (Pr. Rec., 38.) Application for writ of error in behalf of said railway companies was presented to the Supreme Court of Texas and therein as basis for the eighth ground of error assigned, it was again urged that the Circuit Court of the United States had exclusive jurisdiction over the matter in controversy to the exclusion of state courts, etc. (Pr. Rec., 3.) The Supreme Court granted the petition for writ of error (Pr. Rec., 74), but on final hearing affirmed the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, thereby overruling the above assignment. The plaintiffs in error therein duly filed their motion for rehearing and as first ground thereof again interposed this demurrer and urged that

the State courts were without jurisdiction to hear and determine the cause of action. (Pr. Rec., 80.) This motion for rehearing was on May 21st, 1913, "duly considered" and overruled (Pr. Rec., 82), and the present writ of error was sued out.

We have thus briefly stated the condition of the record. There are here presented five assignments of error, but each of same is directed to the sole question in effect that under the Act of June 29th, 1906, known as the Interstate Commerce Act, there is no jurisdiction in a state court to hear and determine a cause of action based on the allegation of a failure to furnish cars interstate, but that the exclusive jurisdiction to hear and determine a cause based upon such alleged failure is either by complaint to the Interstate Commerce Commission or by suit filed in the District Court of the United States for the proper district.

Expressing it differently, our contention is that the assumption of jurisdiction by the state courts in denial of the claim of defendants to immunity from suit under the Interstate Commerce Act, except in the Federal Courts, raised a federal question under Section 237 of the Judicial Code sufficient to confer upon this court jurisdiction to review the case. If the subject matter of this litigation is embraced in the act of Congress, it would seem that there is jurisdiction in this court to review the action of the state courts. It must be remembered that the request for cars in this case was for interstate movement and over several lines of railroad. There is directly involved the question of interstate transportation and obligation to furnish facilities therefor. The act to regulate commerce as amended June 29th, 1906, in Section 1, among other things, provides as follows:

"And the 'term transportation' shall include cars and other vehicles and all instrumentalities and facil-

ity of shipment or carriage, irrespective of ownership or of any contract, expressed or implied, for the use thereof and all services in connection with receipt, delivery, elevation, and transfer in transit, ventilation, refrigerating or icing, storage, and handling of property transported; and it shall be the duty of every carrier, subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

It seems to be settled that when a right is given by statute and such statute provides a remedy in a particular court, the remedy in that court is exclusive.

Wills on Jurisdiction, Section 154.

Endlich on Interpretation of Statutes, Sections 154 and 433.

Sedgwick on Statutory Construction, 76.

This is the English rule.

Manchester, etc., Ry. Co. v. Denaby, etc., Colliery Co., 14 Q. B. D., 209; same case on appeal, 11 App. Cases, pp. 113-121.

Rhymney Ry. Co. v. Rhymney Iron Co., 25 Q. B. D., 146.

See also,

Fitzgerald v. Fitzgerald, 41 Neb., 374.

Copp v. Louisville, etc., Ry. Co., 43 La. Ann., 511.

Carlisle v. Missouri Pac. Ry. Co., 168 Mo., 652.

Swift v. Philadelphia, etc., Ry. Co., 58 Fed. Rep., 858.

Van Patten v. Chicago, etc., Ry. Co., 74 Fed. Rep., 981.

Edmunds v. Illinois Cent. Ry. Co., 80 Fed. Rep., 79.

Transportation includes cars and all instrumentalities of carriage and the Railway Company is required to furnish same "upon reasonable request therefor," and the

furnishing of cars upon reasonable request is now required by the act as much as is the making of a reasonable rate or the refraining from giving undue preference. The duty to do the one is no more mandatory than the other and each is fully and completely covered by the act.

Section 8 of the Interstate Commerce Law provides that if any carrier shall do, cause to be done or permit to be done any act, matter or thing in the act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.

Section 9 of the act provides that any person claiming to be damaged may either make complaint to the Interstate Commerce Commission or may bring suit for the recovery of damages for which such common carrier may be liable under the provisions of this act in any district or circuit court of the United States of competent jurisdiction.

So that, reading the three sections together we have a duty imposed under the first, a cause of action created under the second and a forum prescribed under the third, and it is to be noted that the tribunals given jurisdiction to award damages for a violation of the act or failure to comply with its requirements are specially designated. It is so well established that where Congress has legislated upon a given subject within its cognizance that such legislation is exclusive of State action that we deem it unnecessary to cite authorities. Likewise, that where the forum is prescribed for the redress of a wrong that the remedy so provided and the right of action it-

self is exclusive and it would seem that Section 9 of the act in so far as prescribing a forum was the exercise of a foresight by the Congress that was wise. Obviously harmony in the administration of so important an act is essential to its complete success. As said in *Adams Express Company v. Croninger*, 226 U. S., 505:

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. *Northern Pacific Ry. v. State of Washington*, 222 U. S., 370; *Southern Railway v. Reid*, 222 U. S., 424; *Mondou v. Railroad*, 223 U. S., 1.

To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment."

So that uniformity in the administration of this law and in the correct ascertainment and awarding of damages for alleged violations thereof so as to result in harmonious and uniform application could only be had by confining jurisdiction to the tribunals named in the act. Whether the request for cars as declared on in this case was reasonable under the circumstances and what damages should be awarded for failure to comply

with the request, if lawful, should not be matters to be left to the varying judgment or decision of the various state courts and of local juries because to do so involves an uncertainty of ruling which is strikingly pointed out in the Croninger case. Was a request for 200 cars made some five months before the date they would be expected for use reasonable? Was such request made at such time solely for the purpose of and would it not have the effect of securing to this particular shipper an undue advantage over others who would make their requests within a reasonable time and with reasonable certainty that they would ship on the date cars which might be ordered? Is a request reasonable for such a number of cars so far ahead unaccompanied by any guarantee or protection to the Railway Company that they would be used at the time or that the Company would be indemnified if they were not used? The rights of other shippers were involved. The carrier was required to practically tie up 200 cars for a considerable length of time and thereby to accord to this shipper a preference. The method of car distribution used by the carriers is here involved. Wherefore, we think it may be pertinently inquired as to whether such questions should not be primarily investigated and determined by the Interstate Commerce Commission in the first instance. This, in order to insure not only uniformity in the administration of the Interstate Commerce Act but to secure to all shippers transportation facilities without undue preference or discrimination.

If a claim for damages upon the ground that a rate that has been charged is unreasonable and, therefore, violative of the Act must be first submitted to the Commission for determination in order to secure uniformity, then must there not also be first submitted to the Commission the question whether the request for transporta-

tion facilities was "reasonable" and that whether the failure of the carrier to comply therewith on account of its method of car distribution owing to the great demand was violative of the act. The question of proper distribution of cars and car service is just as much within the province of the Interstate Commerce Commission and that Act as is a discrimination in rates or against localities.

B. & O. Ry. Co. v. Pitcairn Coal Co., 215 U. S., 481.

Morrisdale Coal Co. v. Pennsylvania R. R., 230 U. S., 304.

We quote from *C. R. I. & P. Ry. v. Hardwick Elevator Co.*, 226 U. S., 434:

"The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement sec. 1 of the original act imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections 'shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.' Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the violation of that duty. Thus, by sec. 8 it is provided 'That in case any common carrier subject to the provisions of this act * * * shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in

every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.' Further by Sec. 9 an election is given either make complaint to the Interstate Commerce Commission or to bring, in a designated court, action for the recovery of damages, and by Sec. 10 it is made a criminal offense for an employee of a corporation carrier to 'wilfully omit or fail to do any act, matter, or thing in this act required to be done.'

As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. The result, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power. *Southern Ry. Co. v. Reid*, 222 U. S., 424."

In *Interstate Com. Commission v. B. & O. Railroad*, 145 U. S., 275, Mr. Justice Brown said:

"Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat., 379, c. 1, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the

der in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable."

State statutes, therefore, which impose an obligation to furnish cars demanded in pursuance of some prior specified notice of the shipper created a new right. So it would seem that the amendment of June 29, 1906, to Section 1 of the Interstate Commerce Law, imposing upon every carrier the obligation to furnish cars or vehicles for transportation "upon reasonable request therefor" also created a statutory right different from that at common law since the obligation at common law was merely to have on hand such equipment as was ordinarily required under normal conditions for the usual business at the particular place and the right to demand cars for loading only existed when the freight was tendered.

But as cars for interstate transportation are only to be furnished "upon reasonable request therefor" and the Act does not define what shall constitute a reasonable request or when the same should be made, the case falls under the rule of those under the 1st and 3rd sections of the Act which would require preliminary investigation and determination by the Commission before the courts could be called upon to take jurisdiction. See:

Mitchell Coal Co. v. Penna. R. R. Co., 230 U. S., 258.

It was contended in *T. & P. Ry. v. Abilene Cotton Oil Co.*, 204 U. S., 426, that the State court had no jurisdiction over an action to recover damages upon the alleged ground that the rate charged was excessive and unreasonable. This court, however, in deciding the case went further and held that uniformity in the administration of the law in that respect could not be had unless such question of the reasonableness of the rate was first submitted to the Interstate Commerce Commission and that there-

fore prior to the decision of the Commission no court could have jurisdiction.

The same rule was applied with reference to an action to recover damages for alleged discriminatory rates in *Robinson v. B. & O. R. R.*, 222 U. S., 506.

In the case at bar there was necessarily involved the question as to the propriety of the distribution made by the railroad companies of their equipment in view of the unusual demands at that time for all kinds of cars. A local jury in a local court as well as the local court itself would be apt to ignore the necessities and demands of other localities and shippers and would pay no heed to any apparently fair distribution of equipment made by the carriers, so as to equalize the supply to all localities upon their lines. What was the purpose of Congress in providing in the amendment to the act that "transportation" should include cars and instrumentalities of transportation and that it should be the duty of every carrier to furnish such instrumentalities "upon reasonable request"? Was it not to bring the entire subject matter under the Interstate Commerce Law so as to secure not only uniform rules but a uniform administration of the practices of carriers and also so as to provide that the matter of damages growing out of any infraction of the act should be uniformly and consistently ascertained and determined so as to prevent any shipper through local influences securing advantages not open to all. Such advantages may be as well secured through claims for alleged damages growing out of violation of the act as by other means.

Necessarily the question as to what are proximate and legitimate damages arising out of an alleged violation or infraction of the Interstate Commerce Act and which may be recovered, is one of federal law and can only be uniformly determined by confining jurisdiction

to the federal courts. Otherwise, there would be the greatest contrariety in the enforcement of the act. For instance, the rule of damages arising out of discrimination in rates applied by this court in *Pennsylvania R. R. v. International Coal Co.*, 230 U. S., 184, would probably not be applied in some of the State courts.

We think the conclusion is irresistible that the furnishing cars for interstate transportation and the obligation of the carrier in respect thereto, are matters governed wholly and solely by the provisions of the Interstate Commerce Act heretofore quoted. The carrier and shipper can no longer enter into any special contract or agreement covering such matters and the common law which might theretofore have authorized a special undertaking or agreement relative to furnishing cars was plainly abrogated by the above act, so that no court would have the right, power or jurisdiction to enforce such a special undertaking and the attempted enforcement thereof by a state court, being clearly violative of the act of Congress, would seem to give to this court jurisdiction to review the ruling.

The obligation of the railroad company in this behalf is dependent solely upon the act of Congress and the question whether it failed to comply with the requirement of that act in respect to furnishing cars and resulting damage was for the sole and exclusive determination of the Interstate Commerce Commission and federal courts as provided in the act. That Congress intended the jurisdiction to hear and determine such matters to be exclusive of state courts we think has been frequently decided.

Van Patten v. Railway Company, 74 Federal, 981.

Sheldon v. Wabash Railroad, 105 Federal, 785.

*Northern Pacific Ry. Co. v. Pacific Coast Lumber
Manufacturers' Association*, 91 C. C. A., 40.

Central Stock Yards Co. v. L. & N. R. R., 112

Federal, 823.

Comis vs. Kings Valley R.R. Co., 10/24 & 908

As analogous and indicating, in a measure at least, not only the exclusive character of federal legislation on a given subject but directly the effect of an act of Congress imposing duties on railway companies relative to furnishing cars, this court held in *Houston & Texas Central R. R. v. Mayes*, 201 U. S., 321, which arose before the Hepburn Act, that a Texas statute attempting to regulate the furnishing of cars for interstate commerce transcended the limits of the proper police power of the state. We quote as follows:

"Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the State, and may have been intended merely to secure promptness on the part of the railroad companies, in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional and accidental violations of its provisions, when no damages could actually have resulted to the shippers.

It should be borne in mind that the act does not apply to cattle alone, but to all cases 'when the owner, manager or shipper of any freight of any kind shall make application in writing,' etc. The duty of the railroad company to furnish the cars within the time limited is peremptory and admits of no excuses, except such as arise from strikes and other public calamities. If, for instance, the owner of a large quantity of cotton should make a requisition under the act for a number of cars, the railway company would be bound to furnish them upon the day named, or incur a penalty of \$25 for each car, though the detention of the cotton involved no expense to the owner, or may even have resulted in a benefit to him through a rise in the market.

While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance.

Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

We also refer to *Southern Ry. Co. v. Reid*, 222 U. S., 424.

A reading of the section of the Interstate Commerce Act as applied to this particular subject impels the conclusion that it was intended to IMPOSE a duty on a carrier in respect to the furnishing of cars for interstate traffic. The use of the word "impose" indicates that the act CREATED a duty that was not merely declaratory of a common law duty theretofore existing. If it imposed a new duty, and it evidently did, the method of enforcement was likewise prescribed, and the method of enforcement is as much exclusive as any other obligation arising under the act.

As we understand the case of *United States v. Pacific & Arctic Co.*, 228 U. S., 87, which was a criminal prosecution, charging violations of the Anti-Trust Act and Interstate Commerce Law, this court again held in principle that the purpose of the Interstate Commerce Act is to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act, and that the conduct of carriers is not subject to judicial review

based on alleged violations of indefinite provisions of the act until submitted to and passed on by the Commission. The failure of the railway companies involved in this suit to distribute and furnish the cars under the contract alleged, is a subject that is fully covered by the act of Congress and upon this question there would seem to be great necessity for a uniform ruling which could only be had by the prior consideration and determination of a single tribunal.

The charge in effect is made in plaintiff's petition that there was an obligation on the part of the railway companies to operate a through route and to furnish the facilities therefor, but this obligation cannot longer rest upon any special contract or agreement but must be found either in the federal law or in the tariffs of the connecting carriers filed in accordance therewith.

The entire subject is fully covered by the federal act, and there can be no cause of action that is not based thereon and as the obligation is at least quasi criminal, the remedies provided must be strictly pursued.

The Supreme Court of Texas in *G. C. & S. F. Ry. Co. v. Moore*, 98 Texas, 302, held that the right of action given by Section 3 of the Interstate Commerce law prohibiting undue preference by railways could be enforced only in the tribunals, on which jurisdiction is conferred by that act—in the United States courts or before the Interstate Commerce Commission—and does not sustain an action in the state court for failing to stop a train at a way station to discharge a passenger by rendering the discrimination made by the carrier in that regard between passengers holding tickets of different character an unlawful one.

We think it, therefore, appears that a defense interposed by the defendants in the original action was based

upon a federal statute. The defense, if good, was a material one and went to the basis of the action itself. Such defense was called to the attention of the state courts and overruled. It was necessary that this defense should be overruled before the judgments entered in the state court could have been rendered. It would seem to be apparent, therefore, that there is here drawn in question a title, right, privilege or immunity claimed under a statute of the United States, and that the decision has been against the right, title, privilege or immunity so set up and claimed. The defendants denied the right of the state courts to entertain jurisdiction of this cause of action. Jurisdiction was entertained and as said by this court in *Illinois Central R. R. v. McKendree*, 203 U. S., 525, the state courts necessarily decided against the right, title or immunity asserted by the defendant.

It was also held in *St. L., I. M. & S. Ry. v. Taylor*, 210 U. S., 281, that the denial by a state court to give to a federal statute the construction insisted upon by a party which would lead to a judgment in his favor is a denial of a right of immunity under the laws of the United States and presents a federal question reviewable by this court.

We quote:

"Congress has regulated and limited the appellate jurisdiction of this court over the state courts by Sec. 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. *Murdock v. Memphis*, 20 Wall., 590, 620. The words of that section material here are those authorizing this court to re-examine the judgments of the state courts 'where any title, right, privilege, or immunity is claimed under * * * any statute of * * * the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under such * * * stat-

ute.' There can be no doubt that the claim made here was specifically set up, claimed, and denied in the state courts. The question, therefore, precisely stated, is whether it was a claim of right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question. *McCormick v. Market Bank*, 165 U. S., 538; *California Bank v. Kennedy*, 167 U. S., 362; *San Jose Land and Water Co. v. San Jose Ranch Co.*, 189 U. S., 177; *Nutt v. Knut*, 200 U. S., 12; *Rector v. City Deposit Bank*, 200 U. S., 405; *Illinois Central Railroad v. McKendree*, 203 U. S., 514; *Eau Claire National Bank v. Jackman*, 204 U. S., 522; *Hammond v. Whittredge*, 204 U. S., 538. The principles to be derived from the cases are these: Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."

Proponents of the motion in the case at bar assert that the questions presented in the state courts were questions of fact, but this can not be sound because the question at issue is one of *jurisdiction* and is a question of law and one concerning which neither evidence was offered nor was same necessary. It arose at the threshold of the proceeding and is a question which it would seem

will be considered by this court even without a specific assignment of error.

We quote from *B. & O. R. R. v. Pitcairn Coal Co.*, 215 U. S., 492:

“One of the assignments of error assails the correctness of the conclusion of the court below to the effect that, compatibly with the act to regulate commerce, there was power under the circumstances disclosed by the record to consider the subject matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such that, even without the assigned error, to which we have referred, the question at the very threshold necessarily arises and commands our attention as to whether there was power in the courts, under the circumstances disclosed by the record, to grant the relief prayed consistently with the provisions of the act to regulate commerce, and to that subject we therefore at once come.”

Again on writ of error to the state court this court may examine the entire record, including the evidence, to determine whether what purports to be a finding of fact is not so involved with, and dependent upon, questions of federal law, as to be really a decision thereof.

Kansas City Southern Railway v. Albers Commission Co., 223 U. S., 573.

See, also:

St. L., S. F. & T. Ry. v. Seale, 229 U. S., 156.

We respectfully submit the motion to dismiss should be overruled.

TERRY, CAVIN & MILLS,

A. H. CULWELL,

ROBERT DUNLAP,

Attorneys for Plaintiffs in Error.

HARDINER LATHROP,

Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 320

THE EASTERN RAILWAY COMPANY OF NEW MEX-
ICO, THE PECOS AND NORTHERN TEXAS RAIL-
WAY COMPANY, ET AL.,

Plaintiffs in Error.

V.

GEORGE W. LITTLEFIELD, J. P. WHITE AND
THOMAS D. WHITE, COMPOSING THE FIRM OF LIT-
TLEFIELD CATTLE COMPANY,

Defendants in Error.

MOTION OF DEFENDANTS IN ERROR TO DISMISS
WRIT OF ERROR.

TO SAID HONORABLE COURT:

George W. Littlefield, J. P. White and Thomas D. White, composing the firm of Littlefield Cattle Company, Defendants in Error, come now and file this their motion to dismiss the writ of error herein granted by this Honorable Court, and they move the court to dismiss the writ of error herein granted because this court is without jurisdiction to try and determine this cause and to grant the relief prayed for by plaintiffs in error for the following reasons, to-wit:

FIRST. Because the record herein fails to show, (1) That some right, privilege or immunity under some statute of the United States was seasonably set up and claimed by plaintiffs in error in the State Court, and, (2) That such right, privilege or immunity was denied by said Court.

SECOND. Because the record herein filed shows affirmatively that exclusive jurisdiction to try and determine this cause was not vested in the United States Courts to the exclusion of the State Courts.

THIRD. Because the record herein shows that the alleged errors of which plaintiffs in error complain involve only questions of fact which were duly tried and determined by the State Courts adversely to plaintiffs in error, and this court has no jurisdiction to review the rulings and decision of the State Courts on such questions of fact.

FOURTH. Because the alleged errors were not seasonably presented to and reviewed by the State Courts in such a way as to confer on this court jurisdiction to review and correct such alleged errors.

FIFTH. Because the record herein shows affirmatively that the judgment rendered by the State Courts was and is not void for want of jurisdiction.

In support of this motion, said defendants in error file and submit herewith their brief in support thereof, and they pray that same be considered in connection therewith.

Respectfully submitted,

W. A. DUNN,

J. A. TEMPLETON,

Attorneys for George W. Littlefield, J. P. White and Thomas D. White, comprising the firm of Littlefield Cattle Company, Defendants in Error.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1914.

No. 320

THE EASTERN RAILWAY COMPANY OF NEW MEXICO,
THE PECOS AND NORTHERN TEXAS RAILWAY COM-
PANY, ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE W. LITTLEFIELD, J. P. WHITE AND THOMAS D.
WHITE, COMPOSING THE FIRM OF LITTLEFIELD
CATTLE COMPANY, DEFENDANTS IN ERROR.

BRIEF OF ARGUMENT FOR DEFENDANTS IN ERROR IN
REPLY TO BRIEF FILED BY PLAINTIFFS IN ERROR IN
OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

W. A. DUNN,
J. A. TEMPLETON,
Attorneys for Defendants in Error.

D. T. BOMAR,
Of Counsel for Defendants in Error.

BRIEF OF ARGUMENT.

Plaintiffs in error concede that the only question presented by the record herein for the decision of this Honorable Court is whether or not the state courts had jurisdiction to render the judgment complained of. Their contention being, "That under the Act of June 29, 1906, known as the Interstate Commerce Act, there is no jurisdiction in a State Court to hear and determine a cause of action based on an allegation of a failure to furnish cars interstate, but that the exclusive jurisdiction to hear and determine a cause based on such an alleged failure is either by complaint to the Interstate Commerce Commission, or by suit filed in the District Court of the United States for the proper District."

In replying to this contention, we reiterate our previous statement to the effect that the defendants in error did not in their petition seek redress for any discrimination either in rates or in the distribution of cars. Neither did they seek to recover damages occasioned by the carriers failure to furnish cars for the movement of the cattle beyond their respective lines of rail-

way. Nor was the action one to recover a penalty provided by any statute for the failure to furnish cars when demanded or to enforce by mandamus or otherwise the performance by the carriers of the duty to furnish cars for the shipment upon reasonable request being made therefor.

On the contrary the sole purpose of the action was to recover such damages as the plaintiffs had sustained by the negligence of the defendants in failing to furnish within a reasonable time after demand made therefor, any cars whatever for the movement of plaintiffs' cattle over any of said lines of railway.

The petition charged that the defendants were notified and requested to furnish the cars on the several dates specified and at the stations named in the notice, which notice was given and accepted first in May 1907; and same was thereafter renewed early in September of said year.

It was charged that such notice and demand was reasonable, and that the defendants were guilty of negligence in failing to comply therewith. Record 4 to 7.

The charge of the court submitting the case to the jury was as follows viz; Record 15 to 19.

Gentlemen of the Jury:

The Court instructs you as to the rules of law applicable to this case as follows, viz:

1. The burden of the proof in this case rests upon the plaintiffs, and before they can recover, plaintiffs must establish by a preponderance of the evidence all the facts necessary to their recovery.

2. Ordinary care, as that term is used in these instructions, mean such care as a person of ordinary prudence would commonly exercise under like circumstances, and the failure to exercise such care and prudence is negligence, as that term is used in this charge.

3. You are instructed that it is the duty of a railway company when engaged in the transportation of freight over its lines of railway to provide and furnish for the use of shippers who desire to have their property transported over such lines of railway, suitable cars wherein to transport such property and to furnish same within a reasonable time after receiving from such shippers notice the number and kind of cars desired and which are necessary for the transportation of such property; and the failure to exercise ordinary care to furnish such cars within a reasonable time after the receipt of such notice constitutes negligence.

4. If you believe and find from the evidence that on or about the 9th day of May, 1907, the plaintiffs gave the defendants through W. S. Merrill, the station agent of defendants at Bovina, Texas, notice of the number and kind of cars
150 which they desired to use in the shipment of their cattle and for the time and place when and where such cars were desired for such use, and if you further find and believe from the evidence that the defendant received and accepted such

notice and that the notice so given was a reasonable one, then you are instructed that it was the duty of defendants to exercise ordinary care to comply with such request and to furnish such cars at the time and place specified in such notice, unless you should find from the evidence that such request was thereafter withdrawn or abandoned by the plaintiffs. And you are further instructed in this connection, that if you should find and believe from the evidence that the plaintiffs, after placing with defendants their orders for one hundred cars to be furnished at Bovina, Texas, requested the defendants to transfer such cars from Bovina, Texas, to Kenna, New Mexico, and to furnish same at said last named station, and that plaintiffs in making such request of defendants, gave to them a reasonable notice of the time when such cars were desired for use at Kenna, and if you further find and believe from the evidence that the notice as given was a reasonable one, then you are instructed that it was the duty of defendants to exercise ordinary care to comply with such request and to furnish such cars for plaintiff's use at such station of Kenna within a reasonable time after receiving from plaintiffs notice to so do, and a failure on the part of defendants to exercise such care to furnish such cars as were reasonably necessary for the movement of plaintiffs' cattle (not exceeding, however, the number specified in such notice) would constitute negligence.

5. If you should find and believe from the evidence that the plaintiffs about the last of August or first of September, 1907, notified defendants through their operator at Kenna, New Mexico, that they desired a sufficient number of cars to be furnished at said station for the use of plaintiffs in the shipment of their said cattle from said station to Kansas City or St. Joe, Missouri, and the plaintiffs in giving such notice and in making such request notified defendants of the number of cars so desired and that they desired same to be furnished at said station on the 15th day of September, 1907, or as soon thereafter as the cars could be furnished, and if you further find and believe from the evidence that the notice so given and the request so made was a reasonable one, then you are instructed that it was the duty of defendants to exercise ordinary care to comply with such request and to furnish such cars as were reasonably necessary for the movement of plaintiffs' cattle within a reasonable time after receiving such notice and a failure to exercise ordinary care to furnish such cars would constitute negligence on the part of the defendants.

6. If you find and believe from the evidence that the plaintiffs about the 9th day of September, 1907, or soon thereafter, relying on the duty imposed upon defendants to furnish the cars which they had requested defendants to furnish for the movement of their cattle (if you find that such request had been made) brought to said station of Kenna about thirty nine hundred head of cattle which they desired to ship to Kansas City and St. Joe, Missouri, as alleged in plaintiffs' petition, and if you

further find and believe from the evidence that said cattle were tendered to defendants at said station for shipment over defendants' lines of railway from such station to Kansas City and St. Joe, Missouri, and if you further find and believe from the evidence that the defendants negligently failed or refused to furnish for plaintiffs' use within a reasonable time after such cattle were so tendered to them for shipment a sufficient number of cars wherein to transport such cattle to their destination, and if you further find and believe from the evidence that said defendants in so failing and refusing to furnish such cars, were

152 guilty of negligence, as that term is defined in this charge, and if you further find and believe from the evidence that as a result of such negligence, the plaintiffs were deprived of the opportunity to transport their said cattle to Kansas City and St. Joe, Mo., and that but for such negligence they would have shipped a number of their said cattle to Kansas City and the remainder thereof to St. Joe, Missouri, where said cattle would have been sold on the markets existing at said places, and if you further find and believe from the evidence that as a result of such negligence on the part of defendants (if you find there was negligence) plaintiffs have suffered injury or damage from their inability to so ship and sell said cattle, then you are instructed that plaintiffs are entitled to recover of and from the said defendants, such injury and damage as you may find from the evidence was the direct and proximate result of the defendants' negligence (if any) for failing to furnish cars for the movement of such cattle to said markets.

7. If under the foregoing instructions you should fail to find from a preponderance of the evidence that defendants were guilty of negligence in failing to furnish cars wherein to ship plaintiffs' cattle and in failing to accept and transport said cattle to the markets at Kansas City and St. Joe as requested by plaintiffs, or if you should fail to find from the evidence that the plaintiffs suffered any injury or damage as a result of the defendants' negligence, if you find there was such negligence, then in either of such events, you will find for defendants.

8. If you should fail to find from the evidence that the notice and request given to defendants by plaintiffs to furnish a sufficient number of cars wherein to ship plaintiffs' cattle was a reasonable one, or if you should fail to find that defendants were guilty of negligence in failing to comply with such request, then you are instructed to find for defendants.

153 9. If you believe and find from the evidence that at the time or times when plaintiffs notified defendants to furnish a sufficient number of cars wherein to move their said cattle, there was an unusual or unprecedented rush of business and demand for cars and motive power on defendants' lines of railway and that such unusual and unprecedented rush and demand continued during the months of September and October, 1907, while said plaintiffs' cattle were being held for shipment at said station at Kenna, and if you further find and believe from

the evidence that the defendants under the circumstances then existing could not by the exercise of ordinary care have foreseen and provided against such unusual rush and unprecedented demand for cars and motive power and that they could not by the exercise of ordinary care procure sufficient motive power and cars to transport plaintiffs' cattle to market when same were tendered to defendants for shipment, or within a reasonable time thereafter, and that said defendants were not guilty of negligence in failing so to do, then you are instructed to find for the defendants. But you are further charged in this connection that it was the duty of defendants to exercise ordinary care to provide sufficient motive power, cars and facilities for the movement of traffic over their lines of railway, which by the exercise of such care might reasonably have been anticipated and provided for and a failure to exercise such care would constitute negligence, and if plaintiffs were injured by such negligence they would be entitled to recover of defendants such damage as proximately resulted to them from said negligence.

10. If you believe and find from the evidence that the plaintiffs or their employes in charge of said cattle which were held at Kenna for shipment were guilty of negligence in bringing said

154 cattle into said station at the time the same were brought there, or in holding said cattle near said station, while waiting for cars wherein to ship same and if you further find and believe from the evidence that said cattle were injured or damaged as a result of such negligence, then you are instructed that plaintiffs can not recover such damage, if any, as you find resulted from their own negligence, or that of their employes. Any and all injuries or damages so sustained by said cattle through the fault and neglect of the plaintiffs, are not recoverable in this suit and should be excluded from your consideration in assessing the damage, if any, which plaintiffs are entitled to recover.

11. If under the foregoing instructions, you should find for the plaintiffs, then you are instructed that in assessing the damage you will ascertain and find from the evidence:

(a) The market value on the markets at Kansas City and St. Joe, Missouri, of such of plaintiffs' said cattle as you find and believe from the evidence would have been shipped by plaintiffs to and sold on said markets, respectively, such value to be estimated on the dates on which said cattle would have been so sold on said markets;

(b) You will then deduct from such market values the usual and necessary expenses incident to the transportation and sale of such cattle on said markets;

(c) You will then find the market values of such cattle at Kenna, New Mexico, at the time when plaintiffs ascertained that they could not procure cars in which to ship the same to said markets, provided such cattle had a market value at such time and place, but if you find they had no such market value at that time and place, you will then find from the evidence the intrinsic

value of such cattle at such time and place. In this connection you are charged that if you should find under paragraph 10 of this charge that plaintiffs' said cattle while being brought to Kenna or held there for shipment, were injured and damaged as a result of the negligence of plaintiffs or their employes in so bringing in and holding said cattle as they did, then in
 155 estimating the value of said cattle at Kenna, you will estimate and find same in the condition said cattle would have been in at such time and place but for the negligence of plaintiffs and their employes.

(d) If you find from the evidence that the net market value of such cattle on said markets exceeds the value of such cattle at Kenna, estimated as above stated, then you will find the difference between such value at Kenna and the net market value of such cattle on the markets at Kansas City and St. Joe, Missouri.

(e) You will then find the expenses, if any, necessarily and properly incurred by plaintiffs in holding said cattle at Kenna while waiting for cars in which to ship them, if you find there was any such expense incurred;

(f) You will then add the amount of such expenses so found, if any, to the difference between the value of said cattle at Kenna and the net market value of said cattle at Kansas City and St. Joe, Missouri, as above ascertained, and you will return a verdict in favor of plaintiffs against the defendants for the amount so found, together with six per cent per annum interest thereon from the first day of November, 1907, to the present time.

12. If under the foregoing instructions you find for the defendants, you will simply so state in your verdict.

13. You are the sole judges of the credibility of the witnesses and the weight of the evidence, but the law you must receive from the Court and be governed thereby.

D. B. HILL,

Dist. Judge, 69th Judicial Dist. of Texas.

It thus appears that the plaintiffs' cause of action was predicated on the defendants' negligence in failing to discharge their common law duty to furnish within a reasonable time after demand made therefor, a sufficient number of suitable cars for the movement of the cattle in question. That the plaintiffs were entitled to recover at common law damages occasioned by the breach of such duty, and that this right of recovery was not created by the Interstate Commerce Act is, we think, too clear for argument. See Hutchinson on Carriers, Sections 292, 293, 497. *Ayers vs. Chicago & Ry. Co.*, 5 Am. St. 226. *Rapalje and Macks Digest*, Railway Law, Vol. 1, Pages 737 and 738, and authorities there cited. *Cinn. etc. Ry. Co. vs. Fairbanks*, 33 C. C. A. 611. *C. & A. Ry. Co. vs. Davis*, 159 Ill. 53; 50 Am. St. 143. *Loomis vs. Ry. Co.*, 101 N. E. 911.

The state statutes in so far as same made it the duty of the carriers to furnish upon reasonable notice so to do a sufficient number of suitable cars to move the cattle, were but expressive of the

common law on this subject, and such statutes are not in conflict with the Interstate Commerce Act and they impose no burden upon interstate commerce. We therefore deny—That the Interstate Commerce Act creates the right or prescribes the remedy which the plaintiffs seek to enforce in this case. Section 22 of said Act expressly preserves "all remedies now existing at common law," saving only such as are inconsistent with the proper enforcement of the Act. That the present action is not of the character indicated is, we think, clearly held by this court in *T. & P. Ry. Co. vs. Abilene Cotton Oil company*, 204 U. S. 426, 51 L. Ed. 553. *G. H. & S. A. Ry. Co. vs. Wallace*, 223 U. S. 481, 56 L. Ed. 522, 523. *Atlantic Coast Line Ry. Co. vs. Riverside Mills*, 219 U. S. 186, 208, 55 L. Ed. 183. *Re Winn*, 213 U. S. 458, 459, 53 L. Ed. 873, 874.

But conceding for the moment that the Interstate Commerce Act creates the right of action which plaintiffs seek to enforce; does said Act provide either in terms or by necessary implication that such right can be enforced only by complaint made to the Interstate Commerce Commission or by action in the United States Court of the proper District? That the Act does not so expressly provide seems clear. Should it be construed to so provide by implication? In *G. H. & S. A. Ry. Co. vs. Wallace*, cited above, this court said:

"Where the statute creating the right provides an exclusive remedy to be enforced in a particular way or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication, and considering the relation between the Federal and State Government, there is no presumption that Congress intended to prevent State Courts from exercising the general jurisdiction already possessed by them and under which they had the power to hear and determine causes of action created by Federal Statute. *Robb vs. Connolly*, 111 U. S. 637, 28 L. Ed. 546.

"On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal but civil and transitory, it was to be subject to the principles governing that class of cases and might be asserted in a State Court as well as in those of the United States. This presumption would be strengthened as to a statute like this passed not only for the purpose of giving a right, but of affording a convenient remedy."

To the same effect is the holding of this Court *in re Mondou vs. N. Y. etc. Ry. Co.*, 223 U. S. 1, 56, 58; 56 L. Ed. 348, 349, wherein the Court said:

"We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the Federal Courts. The act contains nothing which is suggestive of such a restriction, and in this situation the intention of Congress was reflected by the provision in the general jurisdictional act, 'That the circuit courts of the United States shall have cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest

and costs, the sum or value of two thousand dollars, and arising under the Constitution or Laws of the United States.' 25 Stat. at L. 433, Chap. 866; 1 U. S. Comp. Stat. 1901, Page 508; Robb v. Connolly, 111 U. S. 624, 637, 28 L. Ed. 542, 546, 4 Sup. Ct. Rep. 544; United States vs. Barnes, 222 U. S. 513, ante, 291, 32 Sup. Ct. Rep. 117. The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. As was said by this court in *Claflin v. Houseman*, 93 U. S. 130, 136, 137, 23 L. Ed. 833, 838, 839:

"The laws of the United States are laws in the several states and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount, sovereignty. . . . If an act of Congress gives a penalty (meaning civil and remedial) to a party aggrieved without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. . . . It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman vs. Booth*, 21 How. 506, 16 L. Ed. 169; hence the state courts have no power to revise the action of the Federal Courts, nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

Do the authorities cited by plaintiffs in error contravene the rule announced in the authorities cited above? Surely not. The question recurs; are they applicable to this case as presented by the record herein? Let us see. *Adams Express Co. vs. Croninger*, 226 U. S. 491. This court stated the question presented for decision in that case as follows, viz.: "The question upon which the case must turn is whether the operation and effect of the cor-

tract for an interstate shipment, as shown by the receipt of bill of lading, is governed by the local law of the state, or by the acts of Congress regulating interstate commerce." *Ib.* 499, 500.

Manifestly it was with reference to this particular question that the court used the language quoted in plaintiffs in error's brief. This case was originally instituted and tried in the State Court of Kentucky, and the writ of error was granted by this court to the state court to review the judgment rendered. The jurisdiction of the state court was not questioned, but was on the contrary recognized by this court. The court, after stating the purpose of the act under investigation, said; "This was doubtless the purpose of the law, and this purpose will be effectuated and not impaired or destroyed by the state courts obeying and enforcing the provisions of the Federal Statute where applicable to the fact in such cases as come before them." *Ib.* 505. *B. & O. Ry. Co. vs. U. S. Ex. Rel. Pitcairn Coal Co.*, 215 US 481, 500. This was an action to control by Mandamus the distribution of coal cars and to prohibit unjust preferences and undue discriminations by the carrier. Clearly the question there involved was an administrative one which was cognizable in the first instance before the Interstate Commerce Commission, and it was so held, and the judgment of the United States Circuit Court and of the Circuit Court of Appeals granting the mandamus prayed for, was reversed with instructions to dismiss the petition.

Morrisdale Coal Co. vs. Penn. Ry. Co. This was a suit by a shipper to recover damages from a carrier because of discrimination in granting rebates to other shippers. The action was instituted in the United States Circuit Court without first applying to the Interstate Commerce Commission for redress. Reversed and dismissed for want of jurisdiction.

C. R. I. & P. Ry. Co. vs. Hardwick & Elevator Co., 226 US 426. This was an action instituted in the state court to recover statutory penalties imposed by a statute of the state of Minnesota, on carriers for a failure to furnish cars for the shipment of interstate freight. The question at issue was the validity of such a penal statute as applied to interstate carriers. This court held such statute as applied to interstate freight invalid because in conflict with the Interstate Commerce Act. The jurisdiction of the state court to try and determine such a suit was not raised in the case, but such jurisdiction seems to have been recognized, as the case was remanded to the State Trial Court for further proceedings.

Interstate Commerce Commission vs. B. & O. Ry. Co., 145 US 263. This was an action brought before the Interstate Commerce Commission by the Pittsburg etc. Ry. Co. against the B. & O. Ry. Co. to compel that company to withdraw certain rates and to decline to give such rates in the future etc., on the ground that such rates were unjustly discriminating. The jurisdiction of the state courts was in no way involved in the decision.

Mitchell Coal Company vs. Penn. Ry. Co. 230 US 258. This action was instituted in the United States Circuit Court to recover

damages allaged to have been occasioned by the payment of rebates to the plaintiffs competitors in business, whereby his business was injured by discrimination in rates. The jurisdiction of the State Courts over such an action was in no way involved in the action.

T. & P. Ry. Co. vs. Abilene Cotton Oil Company, 204 US 426, 448. The question involved in this case was the power of the state courts to declare unreasonable, and to disregard certain rates, on interstate shipments which had been filed with, and approved by, the Interstate Commerce Commission. This court denied such power and held that redress for such wrongs as were complained of, must be sought in the first instance before the Interstate Commerce Commission. No such issue is involved in the case at bar.

Robinson vs. B. & O. Ry. Co. 222 US 506, 512. This was an action by a shipper to recover of a carrier an excessive freight charge which he claimed to have paid under a rate which he attacked as unjustly discriminatory. The court held that application to the Interstate Commerce Commission for redress, and action by it, on the complaint was a prerequisite to the action.

Penn. Ry. Co. vs. International Coal Mining Company, 230 US 184, 247. This action was instituted in the United States Circuit Court by a shipper to recover certain freight charges which it claimed to have paid in excess of the published rate. Two questions were involved on the appeal, viz; (1.) The jurisdiction of the trial court over such an action and; (2.) Whether the plaintiff paid more than the published tariff rate. This court decided the first question in the affirmative and the second in the negative.

H. & T. C. Ry. Co. vs. Mayer, 201 US 321, 331. In this case the question presented and decided was the validity of the Texas Statute prescribing a penalty for failing to furnish cars for an interstate shipment. The court held the Statute invalid for the same reasons that a similar Statute in Minnesota was held invalid. The jurisdiction of the state court to entertain such an action was not questioned.

Southern Ry. Co. vs. Reid, 222 US 424, 444. This was an action brought in the state court to recover statutory penalties imposed by a state statute on the carrier for failure to receive and ship freight tendered for interstate shipment. The question presented and decided was the validity of such penal statute as applied to interstate shipments. The same ruling was made as in the Minnesota and Texas cases above noticed, and the statute was held to be invalid. The court said, "If a penalty of \$50.00 for refusing to receive freight "when tendered" be no burden on interstate commerce, beyond the power of the state to impose, would a penalty of \$100 or \$1,000 likewise be no burden. May not the power which is competent to impose a penalty select its amount? The penalty of the North Carolina Statute, it must be remembered, is independent of the damage received, and what excuses or defenses may be offered, the decisions of the court

leave in doubt. The statute seems to permit none." *Ib.* 443.

United States vs. Pacific & Arctic Co. 228 US 87. This case is so manifestly inapplicable to the issue we are discussing that comment on it is unnecessary.

G. C. & S. F. Ry. Co. vs. Moore, 98 Tex. 302. This was an action by an interstate passenger against the carrier for damages alleged to have been occasioned by the latter's failure to stop its train and let such passenger off at a station at which that train was not scheduled to stop. The Supreme Court of Texas held that the plaintiff could not recover either at common law or under any statute of the state, but that whatever right of action he had was based on a supposed violation of the Interstate Commerce Act by the carrier, exclusive jurisdiction whereof was by the terms of that act vested in the United States Courts. Whether this decision is or is not correct, as applied to the facts of that case, is not material here, since in this case the plaintiffs clearly had a cause of action at common law to recover damages occasioned by defendant's negligence in failing to furnish, upon reasonable request therefor, cars for the shipment of their cattle.

Van Patten vs. Railway Company, 74 Fed. 981. This was an action by a shipper to recover of the carrier an overcharge in freight rates on an interstate shipment on the ground that the excessive rate exacted and paid was discriminatory.

Sheldon vs. Wabash Ry. Co. 105 Fed. 785. This was an action of mandamus brought by the plaintiff to compel the defendant to cease the enforcement of discriminatory rates of which the plaintiff complained.

Northern Pacific Ry. Co. vs Pacific Coast Lumber Co. 91 CCA 40. This was an action brought in the United States Circuit Court by a number of shippers to enjoin the defendant carrier from putting into effect a proposed increase in certain interstate rates on lumber shipments, etc., on the ground that such rates were unjust, unreasonable, etc. One of the questions presented was the jurisdiction of the trial court to grant the relief prayed for in the absence of a prior application to the Interstate Commerce Commission for relief against the proposed rates. The Circuit Court of Appeals upheld the jurisdiction of the court to grant the injunction until the reasonableness of the rates was passed on by the commission. Clearly neither of the three cases last noticed are applicable to the question here at issue.

Central Stock Yards Company vs. L. & N. Ry. Co. 112 Fed. 823. This was an action by the Central Stock Yards Company, complainant against the railway company, wherein the former by its bill in equity filed in the United States Circuit Court, sought in advance of a hearing on the merits, by temporary mandatory injunction, to compel the defendant to deliver to its stock yards in Louisville, Ky., certain live-stock shipped interstate to the City of Louisville, and which the defendant delivered at the Bourbon Stock Yards in said City; which yards were located not on the defendant's line, but on the line of the Southern Railway Company, a competitive carrier. It seems that the defendant had by

contract with the Bourbon Stock Yards Company, obligated itself to deliver all such stock coming into said City at the yards of the company last named, which were on the defendant's line. Two questions were presented to the court for decision, viz; (1.) The jurisdiction of the court to grant the relief prayed for and; (2.) The right of the relief sought by complainant in advance of a hearing on the merits. The former question was decided in the affirmative, and the latter in the negative. In passing on the jurisdictional question, the court held that no such right as was sought to be enforced in this case existed at common law, and that whatever right the complainant had to the relief sought was created by the Interstate Commerce Act, and as this action was brought to compel the defendant by mandatory injunction, to discharge a duty imposed by that act, the United States Circuit Court of the proper district had jurisdiction of the action. It, is we think manifest that the question thus presented and decided is very different from the one presented in the case at bar, and that the decision referred to has no bearing in the present case.

Loomis vs. Lehigh Valley Ry. Co. 101 N. E. 908. This was an action brought by a shipper against the carrier in the State Court of New York to recover the amounts expended by the shipper in preparing certain cars for the shipments of grain moving interstate; the carriers having refused to make the necessary changes in the cars. The majority of the Court of Appeals held that the state court had no jurisdiction of such an action, and that exclusive jurisdiction thereof was vested in the United States Court of the proper district.

Judge Gray dissented and held that the state court had jurisdiction of the action. It seems that the majority of the court were of the opinion that the expense of changing the cars in some way affected the interstate freight rates.

As we view it, none of the cases cited by the plaintiffs in error support their contention that the state court was without jurisdiction to try and determine the cause of action herein declared on, or to grant the relief sought.

So believing, we insist that the writ of error granted herein should be dismissed for want of jurisdiction, and we so pray.

Respectfully submitted,

W. A. DUNN,

J. A. TEMPLETON,

Attorneys for Plaintiffs in Error.

D. T. BOMAR,
Of Counsel.

BRIEF OF DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

THE EASTERN RAILWAY COMPANY OF NEW MEXICO,
THE PECOS AND NORTHERN TEXAS RAILWAY COM-
PANY, ET AL., PLAINTIFFS IN ERROR,

VS No. 320.

GEORGE W. LITTLEFIELD, J. P. WHITE AND THOMAS D.
WHITE, COMPOSING THE FIRM OF LITTLEFIELD CAT-
TLE COMPANY, DEFENDANTS IN ERROR.

To the Honorable Supreme Court of the United States:

George W. Littlefield, J. P. White, and Thomas D. White, composing the firm of Littlefield Cattle Company, defendants in error, come now and controvert the statement of the case made by the plaintiffs in error in their petition for writ of error, and in their brief herein, to the effect that a right, title, privilege or immunity is claimed under a statute of the United States, and an authority exercised under the United States and that the decision was against such right, title or immunity under such statute and under such authority.

They also controvert the statement made by plaintiffs in error, to the effect that the plaintiffs' cause of action was pred-

icated on any provision of the law regulating interstate commerce, and that exclusive jurisdiction to hear and determine such cause of action was vested in the United States Court of the proper district, to the exclusion of the State courts. In support of this contention we submit the following as a correct

STATEMENT OF THE CASE.

The plaintiffs sued the several defendants as agents and partners to recover several thousand dollars ^{damages} which they claimed to have sustained as a result of the defendants' negligence in failing to furnish for plaintiffs' use at Kenna, New Mexico, within a reasonable time after receiving notice so to do, a sufficient number of cars wherein to ship from said station certain cattle which plaintiffs tendered there for shipment to the markets at Kanass City and St. Joe, Missouri.

The petition does not charge any discrimination against plaintiffs in favor of any other persons or places with respect to rates or cars, nor was the legality or reasonableness of the rates in any way involved in the litigation. Neither did the plaintiffs in their petition seek to recover of any one or more of the defendants, damages resulting from a failure or refusal to furnish cars in which to transport the cattle beyond the line of any such defendant.

While the petition discloses that the cattle tendered for shipment at Kenna, N. M., were destined for Kansas City and St. Joe, Missouri, no demand was made for cars in which to carry the cattle beyond the line of any of the defendants furnishing such cars.

On the contrary, the plaintiffs' cause of action is predicated on the failure of the defendants to furnish any cars whatever for the movement of the cattle from the point where the shipment originated over any part of the line. The right of the plaintiffs to demand, and the duty of the defendants to furnish cars wherein to ship said cattle from the point of origin to their final destination was not raised by the pleadings, and no such issue was in fact tried or determined.

For plaintiffs' cause of action as set out in their petition see transcript of record, pages 4 to 7. In the preliminary part of

their petition, the plaintiffs charged that the several defendants at the time these cattle were tendered for shipment were, and that for many years they had been engaged in operating, as agents and partners of each other, under the domination and control of the Atchison, Topeka & Santa Fe Railway Company, their several lines of railway as a single through line extending through the station of Kenna, N. M., and thence through the States of Texas, Oklahoma, Kansas and Missouri to Kansas City and St. Joe in the State last named. See transcript of record, pages 2 to 4.

The several defendants after demurring to the jurisdiction of the court, denied the allegation of partnership. Transcript of record, 7 to 12. An issue of fact was thus raised, which was tried as such and which was determined adversely to the defendants. The proof upon this issue was so conclusive that the trial judge declined to submit it to the jury. See the court's charge and charges refused, transcript of record, 15 to 24.

This action of the trial court was approved by the Court of Civil Appeals. That court said, "Those assignments complaining of the court's action with reference to the pleas of privilege interposed by some of the appellants are disposed of in our conclusion that the undisputed evidence is such as to show that all of the appellants were partners and agents of each other and had a common agent in Deaf Smith County in such a manner as to make them all subject to the jurisdiction of the District Court of that County." Transcript of record, 33 and 34.

This finding of fact by the Court of Civil Appeals the Supreme Court declined to review, because the grounds of error complaining of such finding were not presented as required by the rules of the court.

The court said, "The second and third grounds are not presented in compliance with the rules of court and will not be considered." Transcript of record, 77. These grounds are found on pages 42 and 44 of the transcript. With reference to the eighth ground (transcript, 63) the court said, "The eighth assignment presents no issue in such form as would enable this court to decide it. Transcript, 78.

The rule referred to in so far as it is applicable to the question presented reads as follows, viz: "Applications for writ

of error shall embrace specific assignments of error confined to the points of law presented in the motion for rehearing in the Court of Appeals, and also presented in the motion for a new trial in the trial court. Each ground of error must be presented separately by an assignment stating succinctly and clearly the grounds of error relied on. If it be claimed that the court committed a like error of law in more than one instance all such errors may be presented under one assignment by separate propositions. If the assignment of error be not a proposition of law within itself, then it shall be followed by such propositions as may be necessary to present the question for decision by this court. Each assignment of error may be followed by a statement of facts upon which the applicant relies to show that the decision of the court is erroneous.

If the facts cited in the statement be not embraced in the opinion of the court, then the applicant shall refer to the page and line of the statement of facts upon which he relies, giving the page and line on which the statement begins and on which it ends, omitting all facts not relevant to the proposition." See rule 1 of the State Supreme Court. The second, third and eighth grounds of error as set out in the petition to the Supreme Court for a writ of error, and as copied in the transcript of record filed in this court, are the only assignments which question the jurisdiction of the State courts. It thus affirmatively appears from the record that the question of the jurisdiction was never properly presented to and that it was never in fact considered by the State Supreme Court, otherwise by overruling a motion for a rehearing which merely complained that: "This court erred in overruling the eighth ground of error presented on pp. 39 to 43 in the petition for writ of error as well as erred in that part of the opinion which says, "The eighth assignment presents no issue in such form as would enable this court to decide it and the ninth is of like character and they will not be considered." Transcript of record, 81.

PROPOSITIONS OF LAW.

FIRST: To maintain the jurisdiction of this court it must appear from the transcript of the record, (1) that some right, privilege or immunity is claimed under a statute of the

United States; (2) that such right, privilege or immunity was seasonably and specifically set up and claimed in the State courts and, (3) that the decision of the highest court of the State was against same.

Fed. Stat. Ann. Vol. 4, p. 467, et Seqr., Sec. 709 and notes.

SECOND: The findings and conclusions of the State courts upon all questions of fact are binding upon this court and the sufficiency of such facts to support the judgment rendered will not be inquired into by this court upon a writ of error.

Dower vs. Richards, 151 U. S. 658, 53 L. Ed., 305 to 310.

Chrisman vs. Miller, 197 U. S. 313, 49 L. Ed., 770.

King vs. West Virginia, 216 U. S. 92, 54 L. Ed., 396.

Waters-Pierce Oil Co. vs. Texas, 212 U. S., 86; 53 L. Ed. 417.

Rankin vs. Emigh, 218 U. S. 27, 54 L. Ed. 915.

THIRD: Under the Texas practice, where the evidence, introduced upon any issue of fact, is of such cogency as to conclusively establish such fact, the trial court should, in his charge to the jury, assume the existence of such fact, and refuse to submit it to the jury for their determination.

Texas & Pacific Ry. Co. vs. McCoy, 90 Tex., 264.

G., C. & S. F. Ry. vs. Rowland, 90 Tex., 365.

I. & G. N. Ry. Co. vs. Culpepper, 90 Tex., 627.

FOURTH: The finding of the Court of Civil Appeals to the effect that, "The undisputed evidence is such as to show that all the appellants were partners and agents of each other and had a common agent in Deaf Smith County in such manner as to make them all subject to the jurisdiction of the court of that county," is conclusive of the fact thus found; not only on the State Supreme Court but on this court as well.

STATEMENT.

Article 1590 (formerly Article 996) of the Revised Civil Statutes of Texas, defining the jurisdiction of the Courts of Civil Appeals, is as follows, viz: "The judgment of the Courts

of Civil Appeals shall be conclusive in all cases on the facts of the case."

Vernon's Sayles Texas Civil Statutes, Vol. 1, p. 807.

The State Supreme Court has uniformly held that it must accept the fact as found by the Court of Civil Appeals and its construction of the evidence, if it be fairly susceptible of two constructions.

Hunter vs. Eastman, 95 Tex., 648.

Schwingle vs. Keifer, 153 S. W., 1132.

W. U. Tel. Co. vs. Cates, 148 S. W., 281.

S. A. & A. P. Ry. Co. vs. Nertink, 101 Tex., 165.

Hugo & Co. vs. Paiz, 104 Tex., 563.

FIFTH: The right, privilege or immunity claimed, must not only be specifically set up and claimed in the State courts, but this must be done prior to the decision by the court of last resort of the State; and in the manner required by the State practice. See authorities cited in support of this proposition in Note VIII, pp. 480 to 482, Vol. 4, Federal Statutes Annotated.

SIXTH: Such a question raised for the first time in a motion for a rehearing filed in the State Supreme Court; after the final decision by that court; or in the petition to this court for writ of error comes too late and will not confer jurisdiction on this court.

Fosters Fed. Practice, 5th Ed., Vol. 111, p. 2405, Note 66.

Texas & Pacific Ry. Co. vs. Southern Pac. Ry. Co., 137 U. S., 48; 34 L. Ed., 614.

Turner vs. Richardson, 180 U. S., 87; 45 L. Ed., 438.

McCorquodale vs. Texas, 211 U. S., 423; 53 L. Ed., 269.

Waters-Pierce Oil Co. vs. Texas, 212 U. S., 112; 53 L. Ed., 431.

Forbes vs. State Council, etc., 216 U. S., 396; 5 L. Ed., 534.

SEVENTH: Federal questions which the highest State court is by its settled practice justified in disregarding, either because not assigned or not noticed or relied upon in the

brief or argument of counsel will not serve as a basis of a writ of error from the Federal Supreme Court.

Hulbert vs. Chicago, 202 U. S., 275; 50 L. Ed., 1026.

Cox vs. Texas, 202 U. S., 446; 50 L. Ed. 1099.

Western Electrical Supply Co. vs. Abbeville Electrical L. & P. Co., 197 U. S., 299; 49 L. Ed., 765, 766.

Cincinnati & Ohio Ry. Co. vs. Slade, 216 U. S., 78; 54 L. Ed., 390.

Western Union Tel. Co. vs. Wilson, 213 U. S., 52; 53 L. Ed., 693.

Leathe vs. Thomas, 207 U. S., 93; 52 L. Ed., 118.

Yazoo Ry. Co. vs. Adams, 180 U. S., 1; 45 L. Ed., 395.

EIGHTH: This court, in an action at law, has no jurisdiction to review the decision of the highest court of a State upon a pure question of fact, although a federal question would or would not be presented according to the way in which the question of fact was decided.

Dower vs. Richards, 151 U. S., 658; 38 L. Ed., 305, 309.

NINTH: It is not enough that such right, privilege or immunity was thus set up and claimed, but it must be made manifest either that the right was denied or that the judgment could not have been rendered without denying it.

Western Union Tel. Co. vs. Wilson, 213 U. S., 52; 53 L. Ed., 693.

TENTH: This court will not take jurisdiction of a cause where the judgment of the State court rests on two grounds, one of which does not involve a federal question or where it does not appear on which of two grounds the judgment was based, and the non-federal ground in itself is sufficient to sustain the judgment.

Allen vs. Arguimbau, 198 U. S., 149; 49 L. Ed., 990.

Waters-Pierce Oil Co. vs. Texas, 212 U. S., 112; 53 L. Ed., 431.

Western Union Tel. Co. vs. Wilson, 213 U. S., 52; 53 L. Ed., 693.

Arkansas Southern Ry. Co. vs. German Nat'l Bank, 207 U. S., 270; 52 L. Ed., 201.

Leathe vs. Thomas, 207 U. S., 93; 52 L. Ed., 93.

Vandalia Ry. Co. vs. Indiana, 207 U. S., 359; 52 L. Ed., 246.

ELEVENTH: The plaintiffs' cause of action as declared on in their petition was based on, and grew out of the breach by defendants of their common law duty, to furnish at the point of origin of the shipment, after due and reasonable notice so to do, a sufficient number of suitable cars wherein to ship the cattle, then and there tendered for shipment.

Such a breach of duty was not such a violation of the interstate commerce act as was cognizable alone by the United States Court to the exclusion of the State courts.

Re Winn, 213 U. S., 458; 53 L. Ed., 873, 874.

Atlantic Coast Line Ry. Co. vs. Riverside Mills, 219 U. S., 208; 55 L. Ed., 183.

G. H. & S. A. Ry. Co. vs. Wallace, 223 U. S., 481; 65 L. Ed., 516.

TWELFTH: Notwithstanding the breach of duty on the part of the defendants, of which plaintiffs complain and for which they seek to recover damages, may have been inhibited by, and may constitute a violation of the interstate commerce law, the State courts are not deprived of jurisdiction over such a cause of action, but such jurisdiction is expressly recognized by Section 22 of the act of February 4, 1887, and by paragraph 7 of the act of June 29, 1906, amending Section 20 of the act of 1887.

G. H. & S. A. Ry. Co. vs. Wallace, 223 U. S., 481; 56 L. Ed., 516. Also authorities cited in note to said decision.

Adams Express Co. vs. Crominger, 226 U. S., 491; 57 L. Ed., 314, 320.

Atlantic Coast Line Ry. Co. vs. Riverside Mills, 219 U. S., 208; 5 L. Ed., 185.

BRIEF OF ARGUMENT.

The plaintiffs in error, as grounds for the writ of error applied for and granted herein, assert,

FIRST: "That the Supreme Court of the State of Texas erred in overruling and failing to sustain the eighth ground of error set up in that court and paragraph (b) thereof which was as follows:

(b) The facts show that the court is without jurisdiction over the subject matter in controversy herein, in that it shows that the four defendants are four distinct corporations, owning four distinct lines of road, each located in separate states and territories and that they are not partners.

SECOND: That the Supreme Court of the State of Texas erred in assuming jurisdiction and rendering judgment herein in favor of defendants in error and in failing to sustain the proposition presented by plaintiffs in error in that court to the effect that the Circuit Court (now District Court) of the United States has exclusive jurisdiction over the subject matter in controversy to the exclusion of the State courts.

THIRD: That under the complaint filed herein and evidence adduced, the State courts are without jurisdiction to grant any relief, as under the act to regulate interstate commerce above specified the exclusive jurisdiction to hear and determine complaints and render judgment on causes of action such as are herein declared upon, is vested exclusively in the Circuit Court (now District Court) of the United States and the Interstate Commerce Commission, and there was and is, no power in the State courts to render the judgment that has herein been affirmed."

FOURTH: This is a repetition of the third ground of error.

FIFTH: That the Supreme Court of Texas erred in holding that a portion of the damages sued for were recoverable on the ground of the express contract and undertaking of the defendants, because such contract and undertaking would be and is invalid and contrary to the provision of the Federal Interstate Commerce Law. Transcript of record, 90-91. To these several grounds of error we reply: First, The plaintiffs' petition charged, the evidence proved, and the State courts found as a fact, that the several defendants (plaintiffs in error) at the time the applications for cars where to ship the cattle, were made, and at the time the cattle were tendered for shipment, were engaged in operating, as agents and partners each of the other, under the domination and control of the Atchison, Topeka & Santa Fe Railway Company, their several lines of railway as a single through line, extending through and from the station of Kenna, N. M., thence to

Kansas City and St. Joe, Missouri, and that all of such defendants had a common agent in Deaf Smith County in such manner as to make them all subject to the jurisdiction of the District Court of that county.

The fact thus found must be regarded as established, and the several defendants must be treated as a single carrier operating a single through line of railway extending from the point of origin to the destination of the shipment.

G. H. & S. A. Ry. Co. vs. Wallace, 223 U. S., 491, 492; 56 L. Ed., 523.

With this fact established, the first ground of error submitted by plaintiffs in error, is manifestly without merit. Moreover this ground of error as presented to the State Supreme Court was not presented in the manner prescribed by the rules of that court, in that, (a) it was only one paragraph of an assignment of error presented to the Court of Civil Appeals and which complained in a single assignment of numerous other errors alleged to have been committed by the trial court; (b) the proposition submitted under sub-division (b) of said assignment was not germane thereto, (c) neither the assignment nor the proposition was followed by such a statement as was required by the rules of the court; wherefore, this ground of error was properly disregarded by the court. Transcript of record, 29 to 32, 63, to 66.

SECOND: The second, third and fourth grounds of error submitted to this court present for decision substantially the same propositions of law, viz:

FIRST.

That under the facts of this case as developed and established on the trial in the State courts, exclusive jurisdiction thereof was, by the Interstate Commerce Law and the amendments thereto, vested in the United States Circuit Court, and the Interstate Commerce Commission; wherefore the State courts were without jurisdiction to render any judgment whatever in the case.

SECOND.

That any judgment rendered by the State courts is void for want of jurisdiction over the subject matter of the suit.

THIRD.

That such judgment being void for want of jurisdiction, it is subject to collateral attack and may be reversed on writ of error to this court notwithstanding the questions of law thus raised were never properly presented to, or decided by the State Supreme Court.

Plaintiffs in error assert the affirmative of these propositions, and in so doing contend (1) That the right of the plaintiff to demand and the duty of the defendants to furnish cars for the shipment of the cattle, was created by the Interstate Commerce Act and amendments thereto, and that no such right or duty existed either at common law or by statute until same was created by the act mentioned; (2) That the failure of the defendants to furnish the cars when demanded, was a violation of that act and that the plaintiffs' right of redress must necessarily be based on such act; (3) that exclusive jurisdiction to enforce such right was by the express terms of the act, or by necessary implication vested in the United States Circuit Court and Interstate Commerce Commission, to the exclusion of the State courts; (4) That any judgment rendered in such a case by a State court is void for want of jurisdiction and hence is subject to collateral attack. Let us examine these several contentions. Keeping in view the fact established by the evidence, that all of the defendants were engaged in operating their several lines of railway, as agents and partners, and as a single through line from the point of origin to the destination of the shipment; were they not by the common law charged with the duty of exercising ordinary care to furnish, within a reasonable time, after receiving notice so to do, a sufficient number of suitable cars wherein to ship the cattle, when tendered for shipment? This proposition is so elementary that we deem it unnecessary to cite authorities in support of it. Moreover the statute of the State of Texas in force at the time the cattle in question were tendered for shipment

provided as follows, viz: "It is hereby declared to be the duty of every railroad company operating a line of railroad within this State to provide sufficient tracks, switches, sidings, yards, depots and other facilities for receiving and delivering freight, motive power, cars and other needful facilities and appliances to enable it, with reasonable dispatch, to perform all of its duties as to all traffic which, with ordinary foresight and diligence, could be anticipated as a common carrier, and to furnish all necessary and suitable cars and vehicles of transportation for all freight offered or tendered to it for shipment, within a reasonable time after demand therefor made by any shipper of such freight. Sec. 1, Chap. 14a, Supplement 1908-1910, Sayles' Texas Civil Statutes, page 331.

The statutes of New Mexico then in force provided as follows:

Sections 3862 and 3863, Compiled Laws of New Mexico, of 1897 (being Sections 4 and 5 of Chapter 8 of an Act approved February 2, 1878).

Section 3862. Every corporation formed under this act shall start and run its cars for the transportation of persons and property at such regular times as it shall fix by public notice, and shall furnish sufficient accommodations for all such persons and property as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting and the junction of other railroads and stopping places established for taking and leaving persons and property, and shall transport between such places all such persons and property, on the payment of its lawful charges therefor; provided, such corporation may decline to receive any person afflicted with any contagious disease, or otherwise unfit to be admitted into its cars.

Sec. 3863. In case any corporation formed under this act shall refuse to transport persons or property as provided in the preceding section, or to leave the same at the place of destination, it shall pay to the party aggrieved all damages he or she shall sustain thereby.

Chapter 79, Section 101, Session Acts of 1905, has the following:

"Foreign corporations, including railroad and telegraph corporations having complied with the law shall have the same powers and be subject to all liabilities and duties as corporations of a like character organized under the laws of this territory; but they shall have no other or greater powers."

Do the provisions of the Interstate Commerce Act, abrogate or render inoperative, as applied to interstate shipments the statutes referred to, or prohibit shippers from enforcing their common law rights to recover damages resulting from the defendants' negligence in failing to furnish cars? This depends on whether or not such statutes and the enforcement thereof, and such common law rights are inconsistent with the provisions of the Interstate Commerce Act.

T. & P. Ry. vs. Abilene Cotton Oil Co., 204 U. S., 426; L. Ed., 51, 553.

That such is not the case is we think conclusively established by the decisions rendered by this court in the case last cited and in the following cases, to-wit:

G. H. & S. A. Ry. Co. vs. Wallace, 223 U. S., 481; 56 L. Ed., 516, 522, 523.

Atlantic Coast Line Ry. Co. vs. Riverside Mills, 219 U. S., 186, 208; 55 L. Ed., 183.

Re Winn, 213 U. S., 458, 459; 53 L. Ed., 873, 874.

These cases hold, "That damage caused by defendants' negligence in failing to transport and deliver goods received for interstate shipment" was in no way tracable a violation of the statute, and is not therefore within the provisions of Sections 8 and 9 of the act to regulate commerce. They also hold that the State courts have jurisdiction of such causes of action. If this be true, why have not such courts jurisdiction of an action to recover damages occasioned by the negligence of the carriers in failing to furnish cars for an interstate shipment? Such a failure is just as much a breach of a common law duty as is a failure to safely transport and deliver such a shipment after receiving it, and if jurisdiction exists in the one case, we see no reason why it does not also exist in the other. But is it true that the State courts have no jurisdiction to enforce a cause of action created by, and based on a statute of the United States?

That such jurisdiction may and generally does exist has been repeatedly held by this court. See authorities cited above, also

Adams Express Co. vs. Crominger, 226 U. S., 491; 57 L. Ed., 314, 320.

G. H. & S. A. Ry. vs. Piper, 115 S. W., 107.

Shoshone Mining Co. vs. Rutter, 177 U. S., 505, 507; 44 L. Ed., 864.

Nelson vs. Ry. Co., 168 Fed., 982.

Section 22 of the Interstate Commerce Act reads in part as follows, viz: "And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." The Carmack amendment to Section 20 of said act provides "That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

It seems to us that these authorities conclusively show that the State court had jurisdiction to try and determine this cause and that the judgment rendered by such court is not void for want of jurisdiction to render same.

Replying to the fifth assignment of error submitted by plaintiffs in error, we submit same should not be considered by this court because, (1) It does not appear from the transcript of record filed herein that the question presented by this assignment was ever called to the attention of the State Supreme Court, or that that court ever decided same; (2) The decision of that question was not necessary to the validity of the judgment complained of; (3) The validity of such a contract depends on the facts of the particular case, and this court has no jurisdiction to revise the rulings of the State courts on such question of fact.

This alleged error was not complained of either in the motion for a rehearing filed in the State Supreme Court or in the petition for writ of error to this court. Transcript of record, 80, 81, 83, 84.

If these objections should be overruled and said assignment considered, then we submit that the Interstate Commerce

Act does not prohibit interstate carriers from agreeing to furnish shippers of interstate freight, within a reasonable time after receiving notice so to do, a sufficient number of cars wherein to transport such freight.

A contract so made is valid and same may be enforced by the State courts. See Interstate Commerce Act.

Adams Express Co. vs. Crominger, 226 U. S., 491; 57 L. Ed., 314.

Missouri, Kansas & Texas Ry. Co. vs. Harriman, 227 L. Ed., 657; 57 L. Ed., 690.

Atlantic Coast Line Ry. Co. vs. Riverside Mills, 219 U. S., 186; 55 L. Ed.

In conclusion we submit that the single question presented for the decision of this court is, whether or not exclusive jurisdiction to try and determine such a cause of action was, by the Interstate Commerce Act vested in the Federal Courts and in the Interstate Commerce Commission to the exclusion of the State courts, in such sense as to render any judgment rendered by the State courts void for want of jurisdiction over the subject matter of the suit. We believe that the authorities which we have cited above conclusively answer this question in the negative, and that the writ of error herein should be dismissed for want of jurisdiction in this court and we so pray. But if this cannot be done, then we pray that the judgment rendered in the State courts be in all things affirmed.

Respectfully submitted,

W. A. DUNN,

J. A. TEMPLETON,

Attorneys for George W. Littlefield, J. P. White and Thomas D. White, Composing the firm of Littlefield Cattle Co., defendants in error.

D. T. BOMAR,

Of Counsel for defendants in error.